Nos. 06-82, 06-84, 06-100, 06-101

FILED
AUG 21 2006
OFFICE OF THE CLERK
SUPREME COURT

In The
Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY,

Petitioner

v.

JASON JAY REYNOLDS

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,

Petitioners

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL.,

Petitioners

v.

AJENE EDO

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.,

Petitioners

v.

JULIE WILLES

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

L. RICHARD FISCHER
BETH S. BRINKMANN*
SETH M. GALANTER
NATHAN D. TAYLOR
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544
**Counsel of Record*

August 21, 2006

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. Review Is Warranted To Correct The Ninth Circuit's Expansive Interpretation Of The FCRA's "Adverse Action" Definition, Which Otherwise Will Have A Substantial Negative Effect On The Conduct Of The Financial Services Industry Nationwide	7
A. The Ninth Circuit's Holding That The Failure Of A New Customer To Receive The Lowest Possible Rate Constitutes An "Adverse Action" By The Insurer Will Require The Issuance Of Millions Of Useless Notices And Is Wrong As A Matter Of Statutory Interpretation	7
B. The Ninth Circuit's Holding That All Parties Who Participate In A Transaction That Results In An Adverse Action Are Liable For A Failure To Provide An Adverse Action Notice Threatens To Disrupt Settled Expectations Of The Financial Services Industry	12
II. Review Is Also Warranted On The Proper Interpretation Of The FCRA's "Willfully" Requirement To Correct The Ninth Circuit's Expansive And Erroneous Interpretation That Permits Recovery Of Unwarranted Punitive Damages And Enables Nationwide Class Actions For Statutory Damages	13

TABLE OF CONTENTS – Continued

Page

A. The Ninth Circuit's Ruling Will Permit A Dangerous Array Of Class Actions Seeking Millions Of Dollars In Statutory Damages Without Any Proof Of Actual Harm 14

B. The Ninth Circuit Ignored That A "Willfully" Finding Triggers The Availability Of Punitive Damages, A Disfavored Penal Remedy Subject To Significant Constitutional Limitations 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Ashby v. Farmers Ins. Co. of Oregon, 2004 WL 2359968 (D. Or. Oct. 18, 2004) 14

Blair v. Equifax Check Services, Inc., 181 F.3d 832 (7th Cir. 1999) 16

BMW of N. Am. v. Gore, 517 U.S. 559 (1996) 19

Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945) 18

Bryan v. United States, 524 U.S. 184 (1998) 13, 17

Cavin v. Home Loan Ctr., Inc., 2006 WL 1313191 (N.D. Ill. May 10, 2006) 14

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 16

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 16

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) 9

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 18

In re Farmers Ins. Co., Inc., FCRA Litigation, 2006 WL 1042450 (W.D. Okla. Apr. 13, 2006) 15

In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995) 16

International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979) 16

McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988) 18

Missouri Pac. Ry. Co. v. Tucker, 230 U.S. 340 (1913) 20

TABLE OF AUTHORITIES – Continued

Page

Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942) 18

Parker v. Time Warner Entm't Co., L.P., 331 F.3d 13 (2d Cir. 2003) 15

Powers v. Grinnell Corp., 915 F.2d 34 (1st Cir. 1990) 18

Ratzlaff v. United States, 510 U.S. 135 (1994) 13, 17

Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482 (1915) 20

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 18

Treadway v. Gateway Chevrolet Oldsmobile Inc., 362 F.3d 971 (7th Cir. 2004) 11

STATUTES, REGULATION, AND RULE:

Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*

§ 1681a(k)(1)(A) 11

§ 1681a(k)(1)(B)(i) 6, 8

§ 1681a(k)(1)(B)(iv) 11

§ 1681b(a)(3)(C) 7

§ 1681j(a)(1)(A) 10

§ 1681j(c) 10

§ 1681m(a)(1) 7

§ 1681n(a) 13

§ 1681o 14

§ 1681o(a)(1) 13

§ 1681q 16

TABLE OF AUTHORITIES – Continued

Page

§ 1681r 17

§ 1681s(b) 12, 13

15 U.S.C. § 1691(d)(6) 11

29 U.S.C. § 255(a) 18

29 U.S.C. § 626(b) 18

12 C.F.R. § 202.2(c) 11

Fed. R. Civ. P. 23(b)(3) 14

MISCELLANEOUS:

Brief for Property Cas. Ins. Ass'n of Am. as *Amici Curiae* Supporting Pet. for Reh'g *En Banc* (9th Cir.) (filed Nov. 14, 2005) 9

The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs, 108th Cong. (2003) 9

Federal Rule of Civil Procedure 23, Advisory Committee's note (1998) 15

The Hartford Financial Services Group, Inc., Quarterly Report (Form 10-A) (July 27, 2006) 7

Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance* (2002) 8

Norman J. Singer, *Sutherland Statutory Construction* (6th ed. 2001) 16

BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Financial Services Roundtable respectfully submits this brief as *amicus curiae* in support of the petitions for writs of *certiorari* in these four cases.[1]

INTEREST OF *AMICUS CURIAE*

The Financial Services Roundtable (Roundtable) represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers.

The Roundtable believes that the Ninth Circuit has gone far astray in its interpretations of the Fair Credit Reporting Act (FCRA). The Roundtable urges this Court to grant *certiorari* to address the scope of the statutory terms "adverse action" and "willfully." The Ninth Circuit's unprecedented construction of the term "adverse action" will significantly increase the number of notices that businesses must send to consumers under the FCRA, raising compliance costs for a host of industries without providing any material benefit to consumers. The Ninth Circuit's concurrent expansion of the term "willfully" to include mere recklessness has permitted class action lawsuits seeking statutory and punitive damages that could, in the aggregate, cost the insurance and other financial services industries billions of dollars, despite the absence of any showing of actual injury on the part of the plaintiffs.

The Roundtable therefore respectfully urges the Court to grant the petitions for writs of *certiorari* and to review

---

[1] Letters from petitioners and respondents indicating their consent to the filing of *amicus curiae* briefs have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

and reverse the Ninth Circuit's errant judgments in these four cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues presented in these four petitions for writs of *certiorari* warrant review. This Court would benefit from granting *certiorari* in all four petitions because each petitioner could add valuable depth and focus to the statutory arguments in light of the factual circumstances present in each case. To the extent, however, that the Court is inclined to grant *certiorari* only in a single case and hold the other related petitions pending its disposition, the petition in *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, appears to be the best vehicle for the Court to review in order to correct the Ninth Circuit's erroneous interpretation of both the "adverse action" and "willfully" provisions of the FCRA.

I. A. Only a small number of consumers receive the lowest possible rate for insurance when those rates are based in part on information in a consumer report. The Ninth Circuit's unprecedented interpretation of the term "adverse action" in the FCRA to require notice to a consumer when an insurer issues him anything but the lowest possible rate will force insurance companies to issue tens of millions of pointless notices to consumers. That deluge of additional notices will provide consumers with little, if any, appreciable benefit, and may, in fact, harm consumers by overloading them with information and numbing them to the important notices they otherwise receive.

The Ninth Circuit's interpretation of "adverse action" in this case is contrary to the plain language of the FCRA. The FCRA adverse action requirements do not address a hypothetical comparison of the rate charged to a consumer with the rate available to all consumers with "more favorable" consumer report information. The statutory framework confirms this point.

There also is a risk that the Ninth Circuit's holding may be extended beyond insurance to credit transactions and other transactions governed by the FCRA, which would

increase the number of adverse actions notices astronomically, burying consumers in paper. The extension of the Ninth Circuit's erroneous interpretation to credit transactions could have a dramatic adverse effect on banks and other lenders.

B. The Ninth Circuit's holding that all parties who participate in a transaction that results in an adverse action are each liable for a failure to provide an adverse action notice finds no statutory basis in the FCRA. The Ninth Circuit's ruling threatens to expand the reach of FCRA liability to banks and other lenders for insurance transactions, far beyond the intent of Congress. The potential effect of such an interpretation would be significant.

II. The Ninth Circuit's substantial relaxation of the "willfully" requirement for the award of statutory and punitive damages under the FCRA imposes significant liability not intended by Congress. The Ninth Circuit held that, in order to establish the willfulness necessary to obtain these special damages, a plaintiff need not demonstrate that a defendant knew its action violated the FCRA, even though such knowledge is an essential part of the typical definition of willfulness employed when punishment is involved.

A. By adopting a more lenient standard than most (if not all) other circuits, the Ninth Circuit has become a magnet for nationwide class action lawsuits alleging a variety of technical violations of the FCRA. This is so because an allegation of "willfully" permits a plaintiff (or, more realistically, an attorney who identifies technical violations of the FCRA and then locates a plaintiff in whose name to sue) to demand statutory damages for certain FCRA violations of at least $100 and up to $1,000 on behalf of each member of a class, a remedy not available if such violations are negligent.

The driving force in this kind of case is not compensation for individual harm, but attorneys intent on extracting money for themselves and a class of uninjured consumers from companies that provide valuable services that may have engaged in unknowing technical violations of a complex regulatory statute. The size of these suits,

and the risk of hundreds of millions (if not billions) of dollars in statutory or punitive damages, sometimes can enable plaintiff attorneys to successfully obtain tens (if not hundreds) of millions of dollars in settlements from entities that can show they acted in good faith, but cannot be certain that they could defeat the Ninth Circuit's unorthodox standard of "willfully."

B. By reading the term "willfully" to encompass states of mind other than a knowing violation of the law, the Ninth Circuit ignored basic rules of statutory construction that weigh against such a low threshold for recovery of punitive damages. The rule of lenity applies to the "willfully" provision of the FCRA because it authorizes punitive damages, which impose penal sanctions. The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions also require the government to prove that a person acted "willfully" in order to establish criminal liability.

The structure of the FCRA also weighs strongly in favor of requiring a plaintiff to establish specific intent in order to recover punitive or statutory damages. In enacting the FCRA, Congress did not permit monetary remedies for every action that is later determined by a court to violate the FCRA. By limiting recovery of even actual damages to instances where a plaintiff can show a negligent violation of the FCRA, Congress necessarily understood that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff. The legislative history confirms that Congress rejected proposals permitting the award of statutory or punitive damages for gross negligence, a term often used interchangeably with recklessness.

Finally the requirement that a federal statute be read to avoid doubt about its constitutionality also supports an interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to not comply with the FCRA. The contrary interpretation of the term by the Ninth Circuit raises substantial questions

about the constitutionality of the statute in light of the Constitution's substantive limits on punitive damages awards. For offenses such as those created by the FCRA – which occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particular set of persons – the absence of a requirement that the defendants have engaged in conduct knowing that it was unlawful would draw into significant question every award of punitive damages under the FCRA.

ARGUMENT

The Ninth Circuit's published decision in *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, was applied immediately in several unpublished opinions issued the same day. That interpretation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, has produced four petitions for writs of *certiorari*: *Hartford Fire Ins. Co. v. Reynolds*, No. 06-82; *Safeco Ins. Co. of Am. v. Burr*, No. 06-84; *Geico Gen. Ins. Co. v. Edo*, No. 06-100; and *State Farm Mut. Auto. Ins. Co. v. Willes*, No. 06-101.

All four *certiorari* petitions challenge the Ninth Circuit's unduly expansive view of what showing is sufficient to establish that a defendant "willfully" violated the FCRA so as to trigger the availability of statutory and punitive damages. Each of the four petitions is an appropriate vehicle in which the Court could address that important question on which the circuits are divided because each of the Questions Presented on the "willfully" issue appears adequately broad to allow the Court to resolve all the necessary issues.

Three of the petitions also seek review of the Ninth Circuit's erroneous construction of a different and equally important provision of the FCRA that defines "adverse action" for various purposes, including for when businesses must provide certain notices to consumers. This "adverse action" issue affects the day-to-day operations of financial services entities subject to the FCRA and could pose substantial compliance burdens on them with no material benefit to consumers regardless of how the "willfully" issue is

resolved. These three petitions thus merit review by this Court on the adverse action issue as well.

This Court would benefit from granting *certiorari* in all four cases because each petitioner could add valuable depth and focus to the statutory arguments as well as useful clarity in light of the varied factual circumstances present in each case. To the extent, however, that the Court is inclined to grant *certiorari* only in a single case and hold the other related petitions pending its disposition, the petition in *State Farm*, No. 06-101, appears to be the best vehicle for the Court to address the "adverse action" and "willfully" provisions of the FCRA. The scope of the Question Presented in each of the petitions on the "adverse action" issue is somewhat different. The question in the *State Farm* petition,[2] however, is broad and encompasses the question in *Geico*.[3] Also, resolution of the question in *State Farm* is antecedent to the question in *Hartford*,[4] which focuses only on the required content of an adverse action notice and not on the threshold question of whether a notice is required.[5]

---

[2] "Whether the Ninth Circuit Court of Appeals erred in interpreting key statutory terms in the definition of 'adverse action' in the Fair Credit Reporting Act, 15 U.S.C. § 1681a(k)(1)(B)(i), so as to expand the reach of that definition far beyond its plain meaning, thus substantially increasing the statutory obligations on insurance companies to notify consumers of purported 'adverse actions' and creating vastly expanded potential liabilities under the statute?" *State Farm*, No. 06-101, Pet. at i.

[3] "Whether the Ninth Circuit improperly expanded § 1681m of FCRA by holding that an 'adverse action' has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided?" *Geico*, No. 06-100, Pet. at ii.

[4] "Whether the Ninth Circuit erred in creating new and open-ended disclosure requirements for adverse action notices beyond the discrete list expressly set forth in Section 615 of FCRA, 15 U.S.C. § 1681m(a)." *Hartford*, No. 06-82, Pet. at i.

[5] A factor that may become significant arose in the *Hartford* case subsequent to the filing of that petition. Hartford has informed the Securities and Exchange Commission that, after it filed its petition for *certiorari* in this matter, "the parties entered into a memorandum of

(Continued on following page)

I. Review Is Warranted To Correct The Ninth Circuit's Expansive Interpretation Of The FCRA's "Adverse Action" Definition, Which Otherwise Will Have A Substantial Negative Effect On The Conduct Of The Financial Services Industry Nationwide

The Ninth Circuit erroneously interpreted the term "adverse action" for purposes of the FCRA in a manner that is contrary to the plain language of the statute. In doing so, the Ninth Circuit held that any consumer who does not receive the lowest possible rate has suffered an adverse action, that every entity that participates in that action is liable for failure to provide an adverse action notice, and that each adverse action notice must contain detailed information far beyond that identified in the FCRA itself. The potential impact of this erroneous ruling on the insurance industry is quite significant, and its impact may extend far beyond to other industries as well.

A. The Ninth Circuit's Holding That The Failure Of A New Customer To Receive The Lowest Possible Rate Constitutes An "Adverse Action" By The Insurer Will Require The Issuance Of Millions Of Useless Notices And Is Wrong As A Matter Of Statutory Interpretation

Under the FCRA, if an insurance company takes an "adverse action" with respect to a consumer in connection with its underwriting decision, based at least in part on a consumer report that it obtained in connection with the underwriting under 15 U.S.C. § 1681b(a)(3)(C), the insurance company must provide the consumer with notice of the adverse action. *See id.* § 1681m(a)(1). The FCRA

---

understanding setting forth the essential terms of a class settlement in this action. The settlement is subject to certain contingencies, including preliminary and final approval by the district court." The Hartford Financial Services Group, Inc., Quarterly Report (Form 10-Q), at 86 (July 27, 2006).

defines the term "adverse action" for insurance as "a denial or cancellation of, *an increase in any charge for*, or a reduction or other adverse or unfavorable change in the terms or coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." *Id.* § 1681a(k)(1)(B)(i) (emphasis added).

The Ninth Circuit erroneously held that the phrase "an increase in any charge for" insurance coverage includes an initial purchase of new insurance where the consumer is charged a rate that is higher than what the consumer would have been charged if his score, based on information from his consumer report, was the "top potential score." *State Farm*, No. 06-101, Pet. App. 43a. Under that interpretation, an adverse action occurs whenever a "consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable." *Ibid.*

1. The Ninth Circuit's unprecedented interpretation of the term "adverse action" to include issuance of anything but the best insurance coverage at the lowest possible rate will force insurance companies, and possibly other financial services institutions, to issue tens of millions of pointless notices to consumers.

The effect of the Ninth Circuit's holding on insurance companies will be dramatic. Only a small number of consumers will receive the lowest possible rate for insurance when those rates are based in part on information from the consumer reports. At many insurance companies that rely in part on such information to set rates, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance*, Apps. C & D (2002). As a result, the Ninth Circuit's holding will require insurance companies to provide adverse action notices to nearly all consumers who purchase insurance, *i.e.*, all but the small group who have the "best" scores and receive the lowest possible rates. Because the majority of consumers nationwide must obtain automobile and/or homeowner's insurance, the Ninth Circuit's holding will require businesses to produce and send tens or hundreds of millions of additional adverse action

notices each year. *See* C.A. Br. for Property Cas. Ins. Ass'n of Am. as *Amici Curiae* Supporting Pet. for Reh'g *En Banc* at 2 (filed Nov. 14, 2005) (insurers in 2005 issued approximately 24 million homeowners policies and 48 million – personal automobile policies using credit information).

Congress could not have intended such an absurd result. The Federal Trade Commission cautioned Congress to this effect when Congress was addressing revisions to the FCRA. It explained how important it was "to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong., 529 (2003) (testimony of Joel Winston, Associate Director, Bureau of Consumer Protection, Federal Trade Comm'n).

That deluge of additional notices will provide consumers with little, if any, appreciable benefit, and may, in fact, harm consumers. For example, the notices may confuse or mislead consumers who receive insurance at favorable rates because of their good credit histories, but not at the lowest possible rates. In addition, as more adverse action notices are provided, there is a real risk that the effectiveness of the notices intended by Congress will be substantially diluted. Consumers may begin to treat the notices as boilerplate disclosures that should be ignored. *See Senate Hearings*, *supra*, at 95-96 (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("[I]f you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore."); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (discussing problem of "informational overload").

Also, the flood of additional notices will undercut their statutorily intended function – focusing consumers on potential material inaccuracies in their consumer reports. For example, a consumer with a good credit history who obtains insurance at a favorable rate, but receives an adverse action notice, could spend unnecessary time investigating a consumer report for material inaccuracies that do not exist.

2. The Ninth Circuit's interpretation of "adverse action" is contrary to the plain language of the FCRA. The relevant portion of the statute specifies that an adverse action occurs only if consumer report information is used, in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. As a result, if a consumer receives *the same rate or a better rate* than she would have received if her consumer report information had not been considered, an adverse action has not occurred because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The FCRA adverse action notice requirements are triggered when information in a consumer report has an actual and negative impact on a consumer's insurance rate. They do not address a hypothetical comparison of the rate charged to the consumer with the rate available to all other consumers with "more favorable" consumer report information.

The statutory framework confirms this point. Each adverse action notice entitles the recipient to a free consumer report from the consumer reporting agency. *See* 15 U.S.C. § 1681j(c). If Congress had intended the FCRA adverse action requirements to generate free consumer reports to nearly all consumers, Congress would not have needed to amend the FCRA in 2003 to require that consumer reporting agencies provide consumers with a free consumer report once each year upon request, *see id.* § 1681j(a)(1)(A), because the only consumers not already receiving them would be the small number of consumers with the top credit scores who have no need for them.

3. There is a risk that the Ninth Circuit's holding may be extended beyond insurance to credit transactions and other transactions governed by the FCRA, which would increase the number of adverse actions notices astronomically, burying consumers in paper. *Cf. Senate Hearings*, *supra*, at 48 n.15 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) (each day, two to three million consumer reports subject to the FCRA are issued).

Application of the adverse insurance ruling in this case should not apply in the context of credit because the FCRA

specifies that, in the credit context, the term "adverse action" "has the same meaning as in" the Equal Credit Opportunity Act. 15 U.S.C. § 1681a(k)(1)(A). That Act, in turn, defines "adverse action" to mean "a denial or revocation of credit," 15 U.S.C. § 1691(d)(6), and its implementing regulations make clear that if a consumer applies for credit at a specific rate but the lender makes a counteroffer at a different rate, there is no adverse action if the consumer accepts the lender's counteroffer, *see* 12 C.F.R. § 202.2(c).

There is yet another definition of "adverse action" in the FCRA, however, that at least one court has applied in the credit context. That definition of "adverse action" provides that an adverse action is one that is "made in connection with an application * * * made by, or a transaction * * * initiated by, any consumer" and is "adverse to the interests of the consumer." 15 U.S.C. § 1681a(k)(1)(B)(iv). Congress intended this "miscellaneous" definition to apply to transactions other than credit or insurance, as indicated by the transaction-specific definitions of adverse action and the legislative history. *See Senate Hearings*, *supra*, at 53 & n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n). The Seventh Circuit, however, in a conclusory opinion that finds no basis in the statute, erroneously held that the "miscellaneous" definition can apply to credit transactions. *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 982 (7th Cir. 2004).

There is a significant risk that courts could conclude that, under the Ninth Circuit ruling at issue here, if a consumer is charged a rate for credit that is higher than the rate that the consumer would have been charged if his or her credit score was the "top potential score," the lender has taken an action that is "adverse to the interests of the consumer" within the miscellaneous definition of "adverse action" in the FCRA. The extension of the Ninth Circuit's erroneous interpretation to credit transactions could have a dramatic adverse effect on the compliance activities of banks and other lenders, similar to the effect of the Ninth Circuit's decision on insurance companies.

B. The Ninth Circuit's Holding That All Parties Who Participate In A Transaction That Results In An Adverse Action Are Liable For A Failure To Provide An Adverse Action Notice Threatens To Disrupt Settled Expectations Of The Financial Services Industry

The Ninth Circuit held that all parties who participate in an insurance adverse action are liable for any failure to provide an adverse action notice. *State Farm*, No. 06-101, Pet. App. 47a. The Ninth Circuit opined that Congress did not "intend[] that only a single company be responsible * * * when a consumer is charged an increased rate for insurance." *Id.* at 48a. The Ninth Circuit found that when a consumer is charged an increased rate for insurance and no adverse action notice is provided, the party that makes "the decision as to which of the" affiliated insurance companies will issue the policy will be subject to liability along with the company that issues the policy. This holding finds no statutory basis in the FCRA.

The Ninth Circuit's ruling threatens to expand the reach of FCRA liability for insurance transactions to banks and other lenders, far beyond the intent of Congress. Courts may be persuaded that a bank or other lender is deemed responsible, along with an insurance company, for the failure to provide an adverse action notice in connection with an "increase in the charge" for certain types of insurance coverage that are closely related to credit products. For example, a bank may obtain mortgage insurance to protect the bank from a borrower's default on a mortgage loan. If the bank selects the mortgage insurance company to underwrite the policy based on consumer report information, the Ninth Circuit's interpretation suggests that the bank could be liable under 15 U.S.C. § 1681s(b) along with the insurance company for failure to provide an adverse action notice if the rate charged for the mortgage insurance is not the lowest possible rate.

Similarly, if a consumer wishes to obtain credit-life or credit-disability insurance to protect against default on a credit product obtained from a bank and the bank selects

the insurance company that will receive the consumer's insurance application based on consumer report information, a bank might face liability under 15 U.S.C. § 1681s(b) in the Ninth Circuit if the rate charged for the insurance is not the lowest possible rate and no adverse action notice is provided.

The potential effect of such an interpretation would be significant. Banks and other lenders could find themselves facing enforcement actions for an insurance adverse action that they did not take.

II. Review Is Also Warranted On The Proper Interpretation Of The FCRA's "Willfully" Requirement To Correct The Ninth Circuit's Expansive And Erroneous Interpretation That Permits Recovery Of Unwarranted Punitive Damages And Enables Nationwide Class Actions For Statutory Damages

The Ninth Circuit's substantial relaxation of the "willfully" requirement for the award of statutory and punitive damages under the FCRA imposes significant liability not intended by Congress. The FCRA ensures that any individual who has been injured as a result of a negligent violation of certain of the FCRA's obligations is entitled to compensatory relief for that injury. 15 U.S.C. § 1681o(a)(1). In addition, where a defendant "willfully failed to comply" with such FCRA obligations, *id.* § 1681n(a), Congress authorized uncapped punitive damages and statutory damages of at least $100 and up to $1,000 for each consumer.

The Ninth Circuit held that in order to establish willfulness, a plaintiff need not establish that a defendant knew its action violated the law, even though such knowledge is an essential part of the typical definition of willfulness employed when punishment is involved. *See, e.g., Bryan v. United States*, 524 U.S. 184, 196 (1998); *Ratzlaff v. United States*, 510 U.S. 135, 149 (1994). Instead, relying on a short line of cases that involve extending statutes of limitations and doubling lost wages awards for labor law violations, the Ninth Circuit held that a plaintiff can

establish that a defendant acted "willfully" by demonstrating that the defendant acted "either knowing that the policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *State Farm*, No. 06-101, Pet. App. 53a.

The Ninth Circuit acknowledged that its "reckless disregard" view of the *mens rea* required to establish "willfully" under the FCRA conflicts with both the Sixth Circuit and the Eighth Circuit. *State Farm* Pet. App. 54 n.17. As all the petitioners demonstrate, the Ninth Circuit's standard to determine "willfully" is also contrary to the great weight of other circuit authority.

A. The Ninth Circuit's Ruling Will Permit A Dangerous Array Of Class Actions Seeking Millions Of Dollars In Statutory Damages Without Any Proof Of Actual Harm

By adopting a more lenient standard than most (if not all) other circuits, the Ninth Circuit has become a magnet for nationwide class action lawsuits alleging a variety of technical violations of the FCRA. *See Safeco*, No. 06-84, Pet. at 13 & n.5 (citing recent filings); *see also Hartford*, No. 06-82, Pet. at 23 (hundreds of class actions alleging FCRA violations have been filed in the past two years). This is so because an allegation of "willfully" permits a plaintiff (or, more realistically, an attorney who identifies certain technical violations of the FCRA and then locates a plaintiff in whose name to bring a class action) to demand statutory damages of up to $1,000 on behalf of each member of a class, a remedy not available for negligent violations under Section 1681o.

By avoiding the need to establish actual damages, if any, incurred by each individual member of a class, a "willfully" allegation increases the likelihood that a class composed of a large number of individuals will be certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). *See, e.g., Ashby v. Farmers Ins. Co. of Oregon*, 2004 WL 2359968 (D. Or. Oct. 18, 2004) (class of at least 130,000 insureds); *Cavin v. Home Loan Ctr., Inc.*,

2006 WL 1313191 (N.D. Ill. May 10, 2006) (class of approximately 49,000 members); *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla. Apr. 13, 2006) (class of over one million insureds).

Respondent Willes's complaint in the *State Farm* litigation, which is typical of other alleged FCRA violations plaintiffs seek to litigate as class actions, made no claim that petitioners' actions were negligent or that she personally suffered any actual damages. Instead, her complaint at the time it was dismissed by the district court alleged only willful misconduct and sought only statutory and punitive damages on behalf of a class. *State Farm* Third Amended Complaint (D. Or. Dkt. No. 35) at 4. The allegations in the three other FCRA cases in which *certiorari* petitions are pending are also silent as to the actual harm, if any, suffered by the named plaintiffs and likewise seek only non-compensatory damages for a class.

The driving force for such class actions is not compensation for individual harm, but attorneys intent on extracting money for themselves and a class of uninjured consumers from companies that provide valuable services (and their shareholders) that may have engaged in unknowing technical violations of a complex regulatory statute. *Cf. id.* at 4 ¶ 18 (respondent's counsel "are experienced in class action securities litigation").

The size of these suits, and the risk of hundreds of millions (if not billions) of dollars in statutory or punitive damages, sometimes can enable plaintiff attorneys to successfully obtain tens (if not hundreds) of millions of dollars in settlements from entities that can show they acted in good faith, but cannot be certain that they could defeat the Ninth Circuit's unorthodox standard of "willfully." *See* note 5, *supra*; Fed. R. Civ. P. 23, Advisory Committee's note (1998) (money class actions may force many defendants "to settle rather than incur the costs of defending a class action and run the risk of ruinous liability"); *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (class action for statutory damages "could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem*

effect on defendants, which may induce unfair settlements"); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995).

B. The Ninth Circuit Ignored That A "Willfully" Finding Triggers The Availability Of Punitive Damages, A Disfavored Penal Remedy Subject To Significant Constitutional Limitations

A finding that a defendant acted "willfully" allows an award of punitive damages in suits for all violations of FCRA that can be privately enforced. By reading the term "willfully" to encompass states of mind other than a knowing violation of the law, the Ninth Circuit ignored basic rules of statutory construction that weigh against such a low threshold for recovery of punitive damages.

1. Punitive damages are an "extraordinary sanction." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979). "[B]y definition [they] are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981). Punitive damages "serve the same purposes as criminal penalties," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003), and "have been described as 'quasi-criminal,'" *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citation omitted).

The rule of lenity applies to statutes that authorize punitive damages because punitive damages impose penal sanctions. *See* 3 Norman J. Singer, *Sutherland Statutory Construction* § 59.2, at 121 (6th ed. 2001) (collecting cases applying rule of lenity to statutes awarding punitive damages). The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions require the government to prove that a person acted "willfully" in order to establish criminal liability. *See* 15 U.S.C. §§ 1681q,

1681r; *Ratzlaff*, 510 U.S. at 143 ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

Thus, to the extent that the term "willfully" is ambiguous, it must be read narrowly for purposes of the felony provisions and the punitive damages provisions to protect defendants from punishment. *See Ratzlaff*, 510 U.S. at 148 ("were we to find [the statute's] 'willfulness' requirement ambiguous * * *, we would resolve any doubt in favor of the defendant"). The Ninth Circuit, however, in conflict with other circuits, rejected the reading most favorable to defendants and did not require that plaintiffs show that a defendant had a specific intent to violate the FCRA.

2. The structure of the FCRA weighs strongly in favor of requiring a plaintiff to establish specific intent in order to recover punitive damages. The FCRA is a technical statute that, even decades after its enactment, is still the subject of much uncertainty. When Congress uses the term "willfully" in such "highly technical statutes" that present "the danger of ensnaring individuals engaged in apparently innocent conduct," a defendant must know "that his conduct was unlawful" in order to be liable. *Bryan*, 524 U.S. at 194-195.

In enacting the FCRA, Congress did not permit monetary remedies for every action that is later determined by a court to violate the FCRA. By limiting recovery of even actual damages to instances where a plaintiff can show a negligent violation of certain FCRA provisions, Congress necessarily understood that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff.

Furthermore, the legislative history confirms that Congress rejected proposals permitting the award of statutory or punitive damages for gross negligence, a term often used interchangeably with recklessness. *See Safeco*, No. 06-84, Pet. at 20-21 (describing legislative history); *Geico*, No. 06-100, Pet. at 22 (same). For all these reasons,

the Ninth Circuit erred in not reading the FCRA "willfully" requirement to incorporate a specific intent standard.

The court of appeals disregarded this analysis and, instead, adopted the recklessness standard that this Court employed in interpreting the term "willful" in the Age Discrimination in Employment Act (ADEA) and the Fair Labor Standards Act. *State Farm*, No. 06-101, Pet. App. 53a (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). In neither of those statutes, however, does the willfulness determination trigger an award of punitive damages.

In one provision common to both statutes, at issue in *McLaughlin*, a willfulness finding extends the statute of limitations for bringing suit from two years to three years. *See* 29 U.S.C. § 255(a). In another provision under the ADEA, at issue in *Thurston* and *Hazen Paper*, a finding of willfulness permits a court to award an amount equal to the amount of lost wages as liquidated damages. *See* 29 U.S.C. § 626(b). That liquidated damages remedy, this Court has held, is "compensation, not a penalty or punishment" and serves as remuneration for "damages too obscure and difficult of proof," *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-584 (1942), and as a substitute for prejudgment interest, which is not available, *see Powers v. Grinnell Corp.*, 915 F.2d 34, 39-41 (1st Cir. 1990) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-716 (1945)). The Court made clear that the term "willful" in those statutes was ambiguous and that its meaning in any statute is dictated by the history and structure of the statute. *See McLaughlin*, 486 U.S. at 132-133 (reviewing structure of statute and legislative history); *Thurston*, 469 U.S. at 125-128 (same).

3. Finally, the requirement that a federal statute be read to avoid doubt about its constitutionality also supports an interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to not comply with the FCRA. The contrary interpretation of the term by the Ninth Circuit

raises substantial questions about the constitutionality of the statute in light of the Constitution's substantive limits on punitive damages awards.

The Due Process Clause prohibits unreasonable punitive damages awards and "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). In assessing reprehensibility, a court must consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Ibid.*

Under these factors, the FCRA requirement that a plaintiff establish that a defendant "willfully" failed to comply with the FCRA in order to be eligible for punitive damages must be interpreted to require proof that a defendant knew that its conduct violated the FCRA so as to not raise constitutional doubt. For offenses such as those created by the FCRA – which occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particular set of persons – the absence of a requirement that the defendant engaged in conduct "knowing or suspecting that it was unlawful" would draw into significant question every award of punitive damages under the FCRA. *Gore*, 517 U.S. at 576; *see id.* at 580 ("the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists").[6]

---

[6] The FCRA authorization of statutory damages raises the same serious constitutional doubt under the Ninth Circuit's interpretation because the Due Process Clause prohibits the award of statutory damages that have no relationship to the amount of actual injury

(Continued on following page)

There is no basis in the text, structure, or history of the FCRA that would sustain the Ninth Circuit's minority view of "willfully." Yet given the availability of nationwide class actions, the Ninth Circuit's view will be the one to which defendants will often be subjected. Such a holding requires immediate review from this Court.

CONCLUSION

For the reasons set forth above and in the petitions for writs of *certiorari*, the Court should grant all the petitions. To the extent this Court grants a single petition, it should grant the petition in *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, and hold the remaining petitions pending decision in *State Farm*, and then dispose of them as appropriate in light of that decision.

Respectfully submitted,

L. RICHARD FISCHER
BETH S. BRINKMANN*
SETH M. GALANTER
NATHAN D. TAYLOR
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544

**Counsel of Record*

AUGUST 21, 2006

---

suffered unless there is a showing of specific intent to violate the law. *See Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915) (statutory damages of $100 per day for refusing customer phone service violated due process when company's action was in good faith, impartially applied, consistent with longstanding practice, and done in the absence of any state ruling that conduct was unreasonable, rulings elsewhere that like conduct was reasonable, and weight of differing opinions on company's side); *see also Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory damages of $500 for overcharging customer $3 violates due process because damages were "grossly out of proportion to the possible actual damages").